

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Service Electric Cable TV of New Jersey, Inc.	)	CSR 6404-E
	)	
	)	
Petition for Determination of Effective Competition	)	
in Twenty-six Local Franchise Areas	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 28, 2005**

**Released: December 30, 2005**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. This Order considers a petition that Service Electric Cable TV of New Jersey, Inc. ("Service Electric") filed with the Commission pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that it is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act"),<sup>1</sup> and the Commission's implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation in twenty-six franchise areas ("Franchise Areas"). The New Jersey Board of Public Utilities ("BPU") has filed an opposition and New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") has filed written comments. Service Electric has filed a reply. For the reasons stated below, we deny the petition.

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 623(1) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission's rules.<sup>4</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>5</sup>

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video

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<sup>1</sup> 47 U.S.C. § 543(1).

<sup>2</sup> 47 C.F.R. § 76.905(b)(4).

<sup>3</sup> 47 C.F.R. § 76.906.

<sup>4</sup> See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

<sup>5</sup> See 47 C.F.R. §§ 76.906 & 907.

programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.<sup>6</sup> Turning to the first prong of this test, we find that the DBS service of DirecTV Inc. ("DirecTV") and DISH Network ("DISH") is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>7</sup> The two DBS providers' subscriber growth reached approximately 23.16 million as of June 30, 2004, comprising approximately 23 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the fourth largest, MVPD provider.<sup>8</sup> In view of this DBS growth data, and the evidence of national and regional advertising that Service Electric submits in support of its petition,<sup>9</sup> we conclude that the population of the communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.

4. With respect to the issue of program comparability, our regulations require a petitioner to demonstrate that each competing MVPD offers "at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."<sup>10</sup> Service Electric submitted evidence showing that both DirecTV and DISH meet that standard.<sup>11</sup> Accordingly, we conclude that Adelphia has demonstrated that the Franchise Areas are served by at least two unaffiliated MVPDs, DirecTV and DISH, each of which offers comparable video programming to at least 50 percent of the households in the Franchise Areas. Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each franchise area. Service Electric sought to determine the competing provider penetration in the twenty-six subject Franchise Areas by purchasing subscriber tracking reports that identified the number of subscribers attributable to the DBS providers in eighteen zip code areas that, according to Service Electric, correspond to the relevant Franchise Areas.<sup>12</sup> In its Petition, Service Electric contends that it is subject to effective competition in the Franchise Areas because the number of DBS subscribers for all eighteen zip codes combined (14,029) is more than fifteen percent of the total number of households in those zip codes (34,555).<sup>13</sup>

6. Both the BPU and the Ratepayer Advocate argue that the evidence supporting Service Electric's Petition is fundamentally defective because it does not show, nor permits one to determine, the DBS penetration rate for each franchise area in issue.<sup>14</sup> We agree. As we stated in our *Rate Regulation*

<sup>6</sup> 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup> *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>8</sup> *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 20 FCC Rcd 2755, 2793 (2005).

<sup>9</sup> *See* Petition, Exhibit 1.

<sup>10</sup> 47 C.F.R. § 76.905(g).

<sup>11</sup> Petition, Exhibit 2.

<sup>12</sup> Petition, Exhibit 6.

<sup>13</sup> Petition, Exhibit 4.

<sup>14</sup> Opposition at 4; Comments of the Ratepayer Advocate at 6.

*Report and Order*, the Act itself “expresses the tests for determining effective competition in terms of the ‘franchise area.’”<sup>15</sup> The competing provider test outlined in Section 623 of the Act turns specifically on whether “the number of households subscribing to programming services offered by [MVPDs] other than the largest [MVPD] exceeds 15 percent of the households *in the franchise area*.”<sup>16</sup> Because the statute requires the Commission to determine whether each franchise area is subject to effective competition, the *Rate Regulation Report and Order* rejected a proposed rule that would allow cable operators to demonstrate effective competition on a system-wide basis.<sup>17</sup> Accordingly, the fact that “Service Electric operates the 26 [franchises] as a single contiguous system” is immaterial to our analysis.<sup>18</sup> The statute requires Service Electric to demonstrate effective competition in each franchise area.

7. Pointing to our decision in *Comcast Cablevision of Maryland, Inc.*, Service Electric asserts that the Commission has accepted similar “summations” of DBS penetration data in the past.<sup>19</sup> That assertion is incorrect. In that case, the aggregation of data with respect to multiple CUIDs was appropriate and, indeed, necessary because there was a single franchise area at issue.<sup>20</sup> Here, by contrast, Service Electric’s petition seeks to aggregate DBS penetration rates for 26 distinct franchise areas. Unlike the aggregation of CUIDs, the aggregation of franchise areas is impermissible under the Act and our implementing regulations.

8. Service Electric separately argues that it was compelled to submit data regarding penetration rates on the basis of zip codes, rather than franchise areas, because the Satellite Broadcasting and Communications Association (SBCA), “the sole provider of DBS [tracking reports], provides [that data] on a zip code basis.”<sup>21</sup> To the extent that Service Electric argues that SBCA is incapable of generating franchise-specific tracking reports, Service Electric is mistaken. Indeed, the vast majority of tracking reports that accompany effective competition petitions reflect DBS subscriber data for specific franchise areas. As is clear from Service Electric’s own SBCA tracking report, SBCA can achieve the required specificity even when there is an imperfect fit between zip codes and franchise areas by using “zip+4 [data] where necessary.”<sup>22</sup> Similarly, in those cases where a cable operator has over-inclusive or under-inclusive zip code information, other procedures are available to determine a franchise-area specific DBS penetration rate.<sup>23</sup> Simply put, no technical impediment relieves a cable operator of the statutory burden to demonstrate that each franchise area is subject to effective competition.

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<sup>15</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5672 (1993) (“*Rate Regulation Report and Order*”).

<sup>16</sup> 47 U.S.C. § 543(l)(1)(B)(ii) (emphasis added).

<sup>17</sup> *Rate Regulation Report and Order*, 8 FCC Rcd at 5672-73.

<sup>18</sup> See Reply at 4. Similarly, it is immaterial that the “Petition was filed on a franchise-by-franchise basis, represented by the 26 CUIDs [Community Unit Identifications] listed in the pleading’s caption.” *Id.* at 2-3.

<sup>19</sup> Reply at 3, citing *Comcast Cablevision of Maryland, Inc.*, 19 FCC Rcd 7130 (MB 2004).

<sup>20</sup> *Comcast Cablevision of Maryland, Inc.*, 19 FCC Rcd at 7132.

<sup>21</sup> Reply at 4.

<sup>22</sup> Petition, Exhibit 6.

<sup>23</sup> See, e.g., *Comcast of Dallas, L.P.*, 2005 WL 3041351 (MB November 14, 2005) at 2 (approving of a cable operator’s use of a Media Business Corporation “allocation factor, which reflects the portion of a five digit postal zip code that lies within the border of the City,” to determine DBS subscribership for that franchise area).

9. In view of that burden, Service Electric's petition is defective because there is no way to determine the DBS penetration rate for 26 franchise areas from the data provided in the petition. Nor does Exhibit 7, attached to Service Electric's Reply, cure that defect. That exhibit gives specific DBS penetration rates for certain zip codes and cable systems. However, the exhibit does not report franchise-specific penetration rates because, as Service Electric admits, it is "virtually impossible to retabulate the data according to franchise areas. Some CUIDs serve portions of more than one zip code, other zip codes are served by multiple CUIDs."<sup>24</sup> As that admission makes clear, Service Electric's decision not to request franchise-specific data for either household or DBS subscriber totals is fatal to its petition.<sup>25</sup> Our decision today is without prejudice to the refiling by Service Electric of new effective competition petitions that comply with the requirements of the Communications Act and the Commission's rules.

### III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition filed by Service Electric for a determination of effective competition in the Franchise Areas **IS DENIED**.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>26</sup>

FEDERAL COMMUNICATIONS COMMISSION

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<sup>24</sup> Reply at 5. Service Electric does attempt to produce a franchise-specific DBS penetration rate for one franchise area. *Id.* at 7 & Exhibit 8. To derive the franchise area's DBS penetration rate, Service Electric employs a creative averaging method based on the percentage of its own subscribers in each relevant zip code. We reject that method because it determines DBS subscribership based on Service Electric's subscribership, rather than on the franchise area's relationship to the zip codes in question.

<sup>25</sup> Because this issue is dispositive, we do not reach the BPU and Ratepayer Advocates separate arguments with respect to the contemporaneity of the household data and DBS subscriber data or the propriety of deriving household numbers from postal data rather than from Census Bureau figures.

<sup>26</sup> 47 C.F.R. § 0.283.